



No. 83-734

In the Supreme Court of the United States

OCTOBER TERM, 1983

**BAYOU DES FAMILLES DEVELOPMENT CORPORATION,
PETITIONER**

v.

UNITED STATES CORPS OF ENGINEERS, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there has been a "taking" of petitioner's property for which it is entitled to just compensation under the Fifth Amendment.
2. Whether the Corps of Engineers' denial of petitioner's application for a permit was arbitrary, capricious or otherwise not in accordance with law.

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37 Fed. Reg. 18580 (1972)	0
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Miscellaneous:

Section 350.15(p)	0
Section 350.15(a)(3)	0
Section 350.4(p)	10
Section 300.500(k)(3) (1973)	0' 10
Section 300.500(k)(1)(ii) (1973)	0' 10

33 C.F.R.:

of 1900, § 10, 33 U.S.C. 403	3' 2' 0
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Rivers and Harbors Appropriations Act

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25 Stat. 3234, 16 U.S.C. 530 et seq.	3
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Pub. L. No. 65-262, Tit. IX, § 201

National Parks and Recreation Act of 1908

Clean Water Act, § 404, 33 U.S.C. 1344	2
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U.S. Const. Amend. V	8
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Constitution, statutes and regulations:

Page

(1)

of this Court is invoked under 28 U.S.C. 1254(1).
certiorari was filed on November 3, 1983. The jurisdiction
August 8, 1983 (Per. App. A48). The petition for a writ of
on August 18, 1983. A petition for rehearing was denied on
August 19, 1983, after it was issued as the court's mandate
A47) was dated June 23, 1983, but was not filed until

The judgment of the court of appeals (Per. App. A48-

JURISDICTION

appeals (Supp. Per. App. C1) is not reported.

reported at 241 F. Supp. 1052. The opinion of the court of

The opinion of the district court (Per. App. A10-A43) is

OPINIONS BELOW

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THE FIFTH CIRCUIT

THE UNITED STATES COURT OF APPEALS FOR
ON PETITION FOR A WRIT OF CERTIORARI TO

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PETITIONER

BAYOU DES FAMILLES DEVELOPMENT CORPORATION

NO. 83-134

OCTOBER TERM, 1983

In the Supreme Court of the United States

district court noted (Pet. App. A13), however, the Planning Division that the levee would provide substantial public use protection. As the Planning Division on August 15, 1973, and that the Division indicated sent copies of petitioner's construction plans to the Corps of Engineers. Petitioner correctly states (Pet. 4) that employees of Jefferson Parish

approximately 8000 complete. Pet. App. A13-A14. At the time the cease and desist order was issued, the levee was the construction of the levee and canal was necessary. At the petitioner, stating that it had determined that a permit for January 1974 the Corps issued a cease and desist order to necessary. Receiving virtually no response to its letters, in tioner that a permit for the levee construction might be letters beginning in October 1973, the Corps advised petitioner to the Corps of Engineers for a permit. In a series of from the local government of Jefferson Parish, it did not August 1973. Although it obtained permits for the project Petitioner began construction of its proposed levee in

Pet. App. A11-A15, A23-25. idally washed and inundated with water at mean high tide of the tide. Indeed, much of the subject property itself is coastal. Waterway and both are subject to the ebb and flow Canal and Bayou Boeuf are connected to the Gulf Intracoastal Waterway, a natural waterway. Both the Kentz artificial waterway that extends into the subject property. The plan also called for the blocking of the Kentz Canal, and permit the construction of residences and other buildings. areas. Portions of the property were to be filled in order to construction of a levee and pumping station to drain the development plan called for the excavation of a canal and Mississippi River, not far from New Orleans. Petitioner's imately 5,000 acres of land located on the west bank of the formed in August 1975 to develop and sell a tract of approx- 1. Petitioner is a real estate investment venture that was

STATEMENT

contained in the text above (1914).

about dated October 8, 1933, after which it took prompt action, as it is authorized to issue permits only issued of the project in a is no authority to issue permits. The Division of the Corps of Engi-

neers, the "core area," contains approximately 8,000 acres. Marsh Unit, itself comprising two areas. The first of these

One portion of the park is designated the Bataavia

Recreation Act of 1938, as 21st, 3234, 10 U.S.C. 330 et seq. by § 801 of Pub. L. No. 32-852, the National Parks and

Latite National Historical Park. The park was established

3. Petitioner also raises arguments involving the Jean benefits. Per App. A18-A19.

adverse environmental effects of the project outweighed the other claimed benefits of the project, it determined that the had considered the anticipated good control benefits and denied petitioner's permit application. Although the Corps

On September 13, 1938, the Corps of Engineers finally was provided. Per App. A12-A19.

public comments, even though ample opportunity to do so the project were received. Petitioner did not respond to the many comments adverse to the project and some in favor of the project and the draft EIS was held on October 33, 1932, accordance with the Corps' comments. A public meeting on draft environmental impact statement, which it revised in application for its levee project. It subsequently submitted a

On April 3, 1932, petitioner filed an after-the-fact permit already done on the project. Per App. A12.

application to the Corps for a permit covering the work pay a civil penalty of 252,000 and to submit an after-the-fact through the entry of a judgment that required petitioner to of 1888, 33 U.S.C. 403. That proceeding was resolved Section 10 of the Rivers and Harbors Appropriations Act action against petitioner in district court for violations of

The United States subsequently filed an enforcement

the Corps, recommendation of a lease agreement of the same
petitioner's proposed lease. Petitioner also sought to enjoin
broad withdrawal to the good protection benefit provided by
jurisdiction over the area in 1933 and that it failed to give
better application on the grounds that the Corps lacked
November 5, 1938, seeking to enjoin the Corps, denial of its
District Court for the Eastern District of Louisiana on
3. Petitioner commenced this action in the United States

3309(c).

interests enumerated in 16 U.S.C. 3309(c). 16 U.S.C.
protection zone "as he deems necessary" to protect the
combed, to purchase interests in land within the park
which they have created, the Secretary is authorized, but not
enact laws necessary to the guidelines of law to enforce the
in the event state or local units of government fail to

those had been promised. Per App. A13.

the time of the district court's judgment, no local legisla-
six-month deadline was not met and it is undisputed that at
months from November 10, 1938. (16 U.S.C. 3309(p)). The
U.S.C. 3309(c), were to be developed "no later than six
and protect enumerated values within the core area (16
the statute, these guidelines, whose purpose was to preserve
enforced by the state or local units of government. Under
lies within the park protection zone to be enacted and
of certain applicable to the use and development of protec-
state and local governmental units, to develop "guidelines
directs the Secretary of the Interior, in consultation with
petitioner's lease. Per App. A16. 16 U.S.C. 3309(p) re-
15,000 acres. It includes part of petitioner's land and all of
"park protection zone," and consists of approximately

The other area of the Marsh Unit is denominated the
and have not yet been acquired by the Secretary.

land are contained within the core area (Per App. A13).
U.S.C. 3309(a). Approximately 121 acres of petitioner's
land in that area, with some exceptions not relevant here. 16
The Secretary of the Interior is authorized to acquire all

environmental benefits to be derived from the land in its lot & betwix in 1930. Particularly in view of the extraordinary wise and proper manner in dealing betwix the application Engineers did not act in an arbitrarily, capricious or other-

On the merits, the district court held that the Corps of V50-V52).

had been within that jurisdiction in October 1933 (Per. App. Section 404 of the Clean Water Act, 33 U.S.C. 1344, and that jurisdiction of the Corps of Engineers pertinent to concluding that the project was properly within the betwix-watershed (Per. App. V50-V52). The district court also jurisdiction over Bayou Boeuf, the Kents Canal, and the the Corps of Engineers had properly asserted Section 10 err and now of the tide. Accordingly, the court held that that which of betwix the land was watershed subject to the Bayou Boeuf were subject to that influence and, indeed, betwix the had acquired) that both the Kents Canal and err and now of the tide, the district court concluded (as per for the purposes of Section 10 if they are subject to the a betwix issued by the Corps. Noting that there are naviga-tion or service of any navigable water which authorized by provisions and activity affecting the course, condition, loca-tion and Harbors Appropriations Act, 33 U.S.C. 403, which jurisdiction over the project under Section 10 of the Rivers App. V11). At the outset, the court held that the Corps had Corps of Engineers and on testimony taken at trial (Per. ens passed on an administrative record submitted by the

The district court entered judgment in favor of respon-sibility. Per. App. V18.

the "core area" of the bay without providing funding for its the Department from including betwix the properly within the estate had passed. Finally, betwix the sought to enjoin U.S.C. 3308(p) because the six-month period specified by Department of the Interior from issuing guidelines under 10 that followed by betwix the levee, and to enjoin the

condemning petitioners and located within the core area:
tional authority in the Department of the Interior's denial in
Finally, the court concluded that there was no constitu-

tional issue in the guidelines in the future. Per App. A38-A41.
Accordingly, the court held, the Secretary was not deprived
but rather as a guide for the conduct of orderly procedure. „
The guidelines were „not intended as a limitation on power
six-month deadline within which the Secretary was to issue
prohibit and activities. The court also concluded that the
guidelines called for by the statute would not themselves
constitutionally was premised. Furthermore, the Secretary
issued, the court found that the question of their constitu-
tional rights contemplated by the statute had not been
With respect to the park protection zone, because the local
Jean LaRue National Historical Park was constitutional.

The court further found that the legislation creating the
denial of due process. Per App. A37-A38.

1970, but concluded that the delay did not amount to a
petitioners' denial of due process and the Court, denial of it in
court noted that there had been delay between the filing of
improper selective enforcement. Per App. A32-A37. The
intentionally vague, and that there was no evidence of
ious governing the issuance of permits were not unconsti-
the construction of the lease project, that the Court, regu-
lating petitioners to obtain a permit from the Court for
tional claims, the court found no authority in Congress,
raised by petitioners. With respect to petitioners' constitu-

Finally, the court considered a variety of other issues
facts addressed by the Court. „ Per App. A30-A32.

conditions and application of the relevant statutes to the
denial the permit was based on less than a full investigation of
that by plaintiffs suggests to the court that the decision to
expressly found that „[n]othing in the evidence presented at
needs, denial of the permit was unconstitutional. The court
undisputed facts, the court found that the Court of Engi-

is and located in the core area.

Portion of petitioner's complaint dealing with delay in condemnation of
The court of appeals subsequently dismissed without prejudice the

(219 Cir. 1981); Leslie Salt Co. v. Froehke, 238 F.3d 1437
ing); United States v. DeFries, 641 F.3d 1160, 1135-1132
194, 131 U.S. (1928); 19 at 181-183 (Blackmun, J., dissent-
regulation. See Kaiser Aetna v. United States, 444 U.S.
and how of the tide are navigable for the purposes of such
clear that in tidal waters, areas that are subject to the ebb
ing tides v. Bank, 380 U.S. 131, 133 (1965). It is likewise
—without there being a "taking" of private property. Uni-
waters — to the extent of fortifying and construction
Corps of Engineers' may regulate activities in navigable

It is well settled that the United States, acting through the
property. This argument lacks substance.

therefore is entitled to recover just compensation for its
of the Interior were "confiscatory," and that petitioner
the actions by the Corps of Engineers and the Department

1. The thrust of petitioner's argument (Pet. 3-10) is that
appeals. Further review therefore is not necessary.

Not with any decision of this Court or any other court of
facts. Moreover, the decision is correct and does not con-
tion of longstanding legal principles so well established

The decision of the courts below represents the applica-

ARGUMENT

of the district court (219b, Pet. App. C1);

4. The court of appeals affirmed based on the reasoning
States Court of Claims, Pet. App. A40-A43.

tional taking was solely within the jurisdiction of the United
whether respondents' activities amounted to a constitu-
tutional petitioner had requested; and that the question
mened the purview of a public use protection law in the
that the Corps of Engineers properly declined to recom-

zone and, in any event, it lacked jurisdiction to consider the issue. Federal legislation may taken place with respect to the bank protection Act, 1945-1946, the question is premature in view of the fact that no taking of the property. Moreover, as the district court held (Per App. Inclosure of property within the bank protection zone does not effect a taking in fact, as noted in the text above, in establishing, view, the mere zone designation is alone and that the district court upheld that proposition that the inclusion of property within the bank protection. Petitioner claims (Per 8 U.S.) that respondents never challenged the in the "core area" of the bank.

Petitioner does not contest the Secretary's authority to acquire land

Courts of Engineers acted properly in denying petitioner's

3. There remains the question (Per 10-16) whether the

Construction Co., 308 U.S. 18, 31 (1940).

Cases, 418 U.S. 105, 130-131 (1974); *Kearney v. Ross State Claims Court*, Regional Rail Reorganization Act an adequate remedy under the Tucker Act in the United App. 1945-1946. Plainly, if any taking has occurred there is the jurisdiction of the district court, and it so held (Per.

In any event, the "taking" issue was not properly within

compensation under the Fifth Amendment.

The bank protection zone constitutes a taking requiring no basis for the argument that inclusion of property within of their own rules. See also 10 U.S.C. 530a(p). There thus is only be need to assist local authorities in the brownification not would have no force of law in themselves, but would the guidelines to be developed by the Secretary of the Interior such a taking. As the district court held (Per App. 1946).

Nor does the creation of a bank protection zone amount

taking. See *Kearney v. Ross*, 418 U.S. 105, 130-131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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Μαθητηῶν. Δ.Τ. ὁφείκει ναὶ ἀπολογισθῇ. καὶ τοὶ μαθηταὶ οὐ τὴν
 ἡμετέραν. ἴσαί τινε Διῳγῆσι Κοινῶς ὁμοίῳ καὶ ὁμοίῳ πλ. τινε
 C.E.B. 30d 300(F)(1)(1) οἱ (5) (1d3). ἔπειτα ποῦς τοὶ ἀπολογισθῇ
 Διῳγῆσι Κοινῶς. οἱ ἀπολογισθῇ τινε. ἴσαί τινε πλ. 33 C.E.B. 33
 ἔπειτα κοινῶς τοὶ ἴσαί (C.E.B. 10-11) οὐ τοὶ ὁμοίῳ οἱ τινε Κοινῶς.

[illegible]

*Zuerst werden die Aufgabenstellungen des Projekts mit den Beteiligten diskutiert und die Verantwortlichkeiten festgelegt. Die Aufgaben werden dann in kleine Schritte unterteilt, die in einer Zeitplan- und Verantwortlichkeitsmatrix (RACI-Matrix) festgelegt werden. Die Verantwortlichkeiten werden dann in einer Zeitplan- und Verantwortlichkeitsmatrix (RACI-Matrix) festgelegt.

[illegible][illegible]

FEBRUARY 1984

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BEX E. LEE

Respectfully submitted.

The petition for a writ of certiorari should be denied.

CONCLUSION